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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1952~~ 1953

No. ~~695~~ 30

LOUIS LOBER, CHARLES LOBER AND ALMA T. LOBER, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF MORRIS LOBER, DECEASED,

Petitioners,

vs.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

DAVID STOCK,
Counsel for Petitioners

EHRICH, STOCK, LEIGHTON & HOLLAND,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 695

LOUIS LOBER, CHARLES LOBER AND ALMA T. LOBER, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF MORRIS LOBER, DECEASED,

Petitioners,

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

To the Honorable the Supreme Court of the United States:

Louis Lober, Charles Lober and Alma T. Lober, as executors of the last will and testament of Morris Lober, deceased, by David Stock, their attorney, pray that a writ of certiorari issue to review the judgment of the Court of Claims of the United States.

Summary Statement of Matter Involved

This is a tax case, involving a claim for refund of Federal estate tax. Said tax resulted from the inclusion by the United States in the taxable estate of the petitioners' decedent of the principal of certain inter-vivos trusts created by the decedent (R. 34). Under each trust instrument, the income beneficiary was to receive the principal at the age of twenty-five, with a power reserved to the decedent, as trustee, to accumulate income during said

beneficiary's minority and to accelerate the payment of the principal (R. 5, 9, 12). The Court of Claims decided that each of the trusts was subject to estate tax, on the authority of *Commissioner* v. *Holmes*, 326 U.S. 480, even though, as contended by petitioners, each of said beneficiaries had a vested interest in the income and principal that would pass to his heirs in the event of his death before the age of twenty-five (R. 30-32).

Statutes and Regulations Involved

The statutes and regulations involved may be found in the Appendix, *infra*, p. 22.

Question Presented

Where a decedent creates a trust, under which any accumulated income is to be paid to the income beneficiary at his majority and the principal is to be paid to said beneficiary at age twenty-five, and said beneficiary has a vested interest in said income and principal which would descend to his heirs if he died before receiving the same, does a reserved power, possessed by the decedent at the time of his death, to accumulate income during minority and to pay the principal to said beneficiary before he is twenty-five, bring the principal of the trust within the decedent's gross estate, for Federal estate tax purposes?

Reasons Relied On for the Allowance of the Writ

1. The decision of the Court of Claims is in conflict with the decision of the Court of Appeals for the 5th Circuit in *Hays' Estate* v. *Commissioner*, 181 F. 2d 169, as was expressly recognized by the Court of Claims in declining to agree with it (R. 32).

2. The decision of the Court of Claims is in conflict with the decision of this Court in *Commissioner* v. *Holmes*, 326 U. S. 480, in that the essential factual element upon which that decision was based is absent in the instant case.

3. The decision of the Court of Claims is in conflict with the principle in the following cases, to the effect that Section 811(d) of the Internal Revenue Code covers only powers whose termination by death constitutes a substitute for testamentary disposition.

Porter v. *Commissioner*, 288 U. S. 433;

Loughridge's Estate v. *Commissioner*, 183 F. 2d 294 (CCA 10);

Commissioner v. *Hofheimer's Estate*, 149 F. 2d 733 (CCA 2);

Hauptfuhrer's Estate v. *Commissioner*, 195 F. 2d 584 (CCA 3);

Industrial Trust Company v. *Commissioner*, 165 F. 2d 142 (CCA 1);

Zirjacks v. *Scofield*, 197 F. 2d 688 (CCA 5).

4. The decision of the Court of Claims renders uncertain the functional scope of the applicability of Section 811(d) of the Internal Revenue Code to reserved powers to terminate trusts.

WHEREFORE, it is respectfully prayed that this petition for a writ of certiorari to review the decision of the Court of Claims and the judgment of that Court made thereon be granted.

LOUIS LOBER,
CHARLES LOBER and
ALMA T. LOBER,
As Executors of the Last Will and Testament of Morris Lober, Deceased,

By DAVID STOCK,
Attorney for Petitioners,
20 Exchange Place,
New York 5, New York.

EHRICH, STOCK, LEIGHTON & HOLLAND,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 695

LOUIS LOBER, CHARLES LOBER AND ALMA T. LOBER, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF MORRIS LOBER, DECEASED,

Petitioners,

vs.

THE UNITED STATES

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

Opinion of the Court Below

The opinion of the Court of Claims (R. 29-35) is reported in 108 F. Supp. 731. The dissenting opinion of Chief Judge Jones (R. 32-33) is also reported therein.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. Section 1255(1). The judgment of the Court of Claims was entered on December 2, 1952 (R. 36). A motion for rehearing was duly and seasonably filed by petitioners on December 31, 1952, which was overruled on February 3,

1953 (R. 36). The time for filing petition for writ of certiorari, under 28 U. S. C. Section 2101(c), was thereby extended until ninety days after February 3, 1953. *Morse v. United States*, 270 U. S. 151.

Statement of the Case

The facts pertaining to the question presented here, as set forth in the stipulation of facts (R. 25-30) and as found by the Court of Claims (R. 24-25), may be summarized as follows:

Morris Lober, the decedent, died a resident of the State of New York on December 13, 1942. In 1924 and 1929 he had created essentially identical trusts for each of his three children (R. 5, 9, 12). The principal of each respective trust was to be paid over to the child when he reached the age of twenty-five. The decedent, who was the trustee of each of the trusts, had the discretion to accumulate income during the minority of the child, which accumulated income was to be paid to the child upon his attaining majority. The child was the sole designated beneficiary of the income and principal, with no alternative remainderman provided in the event of his death before the age of twenty-five. The decedent, as trustee, had the power to make distributions of principal to the beneficiary, the amount and time of such distributions resting in his discretion. There was no spendthrift provision in any of the trust instruments (R. 5, 9, 12).

The United States asserted a deficiency of estate tax, the part thereof involved in this proceeding being on the ground that the principal of said trusts was includible in the taxable estate (R. 34). On February 20, 1947, the petitioners, as executors, paid said deficiency, with interest (R. 34).

On April 23, 1947, a claim for refund was duly filed in the amount of $39,012.19, with interest thereon of $6,865.62,

representing the portion of said deficiency that is involved in this proceeding, which was rejected in its entirety by the Commissioner of Internal Revenue (R. 35).

The Court of Claims held that said trusts were includible in the taxable estate, under Section 811(d)(2) of the Internal Revenue Code, on the authority of *Commissioner* v. *Holmes*, 326 U. S. 480.

Specifications of Error

The court below erred:

1. In holding that the power reserved by the decedent, to accelerate distribution to beneficiaries with indefeasibly vested interests, subjects the trusts to estate tax.

2. In not holding that Section 811(d)(2) of the Internal Revenue Code is not applicable to such a power.

Summary of Argument

Each beneficiary had an indefeasibly vested interest in the principal and income of the trust for his benefit, which would go to his heirs, legatees or assigns in the event of his death before the age of twenty-five. Such interest was not subject to defeasance (or reversion) in favor of alternative takers in the event of premature death. There was no such defeating condition which the decedent, by the exercise of the power, could remove by accelerated distribution.

There were no conditional interests in the beneficiary which the decedent could materialize by the exercise of any power or any alternative takers with an expectancy which the decedent could cut off by such exercise of any power, as was the case in *Commissioner* v. *Holmes*, *supra*. The decedent's power was not a substantive power to terminate contingencies upon which the right of enjoyment was staked. The power was only as to the time of enjoyment. It could

not have created or terminated any right of enjoyment of the property or changed the person or persons who were entitled to it.

In the *Holmes* case and every other case involving this question, with the exception of *Hays' Estate* v. *Commissioner*, 181 F. 2d 169 (CCA 5), the power to accelerate distribution was a power to remove a condition upon which the beneficiary's interest was based, and it was this substantive character of the power which was the sole basis for the imposition of the estate tax.

In *Hays' Estate* v. *Commissioner, supra*, the only case involving unconditionally vested interests in the beneficiary, the principle of the *Holmes* case was held not to be applicable, because the decedent did not have such a power to create or terminate any interest.

Section 811(d) has been applied consistently only to powers which reasonably might be deemed to constitute a substitute for testamentary disposition. In the instant case, the estate of any beneficiary who died prematurely would be subject to estate tax with respect to the undistributed principal and income of his trust, because of his ownership therein. If his interest were dependent upon the exercise or non-exercise of a power of the decedent, he would not have the ownership requisite for estate taxation. The power of the decedent cannot be deemed a substitute for testamentary disposition with respect to property over which the beneficiary has such a fundamental and independent ownership.

The creation of a trust under which the reserved power is only with respect to the time of distribution, constitutes a taxable gift. As such a power is insufficient to render the gift incomplete, it is likewise insufficient for estate taxation under Section 811(d).

The failure to distinguish between conditional interests, such as those in the *Holmes* case, and the unconditionally

vested interests in the instant case, would produce the extraordinary result of making Section 811(d) applicable to gifts by a grantor to an infant child, with himself as guardian for such child—since the child has vested ownership subject only to deferment of possession, and the guardian has discretionary power with respect to the distribution of income and principal.

Argument

The court below held that Section 811(d) was applicable to the power held by the decedent, upon the authority of the decision of this Court in *Commissioner* v. *Holmes*, *supra*. It predicated its position upon the following statement in this Court's opinion in that case, which it deemed "conclusive of the instant case" (R. 31):

> "It seems obvious that one who has the power to terminate contingencies upon which the right of enjoyment is staked, so as to make certain that a beneficiary will have it who may never come into it if the power is not exercised, has power which affects not only the time of enjoyment but also the person or persons who may enjoy the donation. More therefore is involved than mere acceleration of the time of enjoyment. The very right of enjoyment is affected, the difference dependent upon the grantor's power being between present substantial benefit and the mere prospect or possibility, even the probability, that one may have it at some uncertain future time or perhaps not at all. A donor who keeps so strong a hold over the actual and immediate enjoyment of what he puts beyond his own power to retake has not divested himself of that degree of control which Section 811(d)(2) requires in order to avoid the tax."

In the *Holmes* case, the decedent created a fifteen year trust for each of his three sons. In the event of the death of a son before the expiration of fifteen years, the principal of his trust was to go to his issue or, failing such

issue, to the other sons or their issue. The decedent reserved the power to distribute or accumulate income and the power to terminate any of the trusts, in which event the principal was to go to the beneficiary entitled to the income.

Obviously, the interests of the sons in the *Holmes* case were not indefeasibly vested, as in the instant case, but were subject to defeasance by death during continuance of the trusts. The power of the decedent to terminate was a power to give the son principal which otherwise would go to other remaindermen, as provided in the trust instrument, in the event the son died during the continuance of the trust. On the other hand, by the non-exercise of the power to terminate or by the exercise of the power to accumulate income the decedent could give the principal or income to the alternative remaindermen in the event of the primary beneficiary's premature death. In so far as the economic interests of the beneficiaries were concerned, the son merely had an expectancy, dependent upon survivorship, which the decedent alone had the power to materialize by termination. It was a power to deprive the alternative remaindermen of their expectancy in favor of the son. Furthermore, there was a spendthrift provision which prevented the son from attempting to assign even his conditional interest.

The taxpayer in the *Holmes* case argued that the sons had a vested interest subject only to divestment by death. This Court rejected such arguments as to the niceties of technical title—whether the sons' interests were subject to a condition subsequent or condition precedent—and obviously based its decision upon the substantive reality that the decedent could, by the exercise of the power, confer an economic benefit on the beneficiary at the expense of someone else who might otherwise take. The decedent had the power at this death, by eliminating defeating contingencies, to consummate economic rights in one beneficiary adversely

to other beneficiaries who otherwise would benefit from the occurrence of the defeating event. To that extent it was a power to create a right of enjoyment in one beneficiary and to terminate co-relative rights in other beneficiaries.

We cannot see how the foregoing statement by this Court in the *Holmes* case, upon which the court below based its decision, can be regarded as "conclusive of the instant case," except by some inexplicable process of inversion. It is submitted that the statement, even literally, but especially when read in its factual context, is clearly antithetical in its meaning to the one ascribed to it by the court below. In the first place, it refers to "the power to terminate *contingencies* on which the *right* of enjoyment is staked." The "right" of enjoyment of the beneficiaries in the instant case was not based upon any contingencies as was the fact in the *Holmes* case. They had all of the rights of ownership of principal and income, subject only to the deferment of possession. They were in no different position than an infant or incompetent, the possession of whose property was in the hands of a guardian or committee. Subject to the deferment of possession, they could pass on their unconditionally vested interests to their heirs, legatees or inter-vivos assigns. Because the ownership of said interests was independently in them, immune from impairment or enlargement by any power of the decedent, said interests would be subject to estate tax in the event of the death of any beneficiary before the termination of his trust; *Kinney's Estate* v. *Commissioner*, 80 F. 2nd 568 (CCA 9); *Estate of John G. Frazer* v. *Commissioner*, 162 F. 2d 167 (CCA 3); but would not be so subject to estate tax if their interests had been conditional, as in the *Holmes* case. *Commissioner* v. *Rosser*, 64 F. 2d 631 (CCA 3).

In the second place, this Court, in the above passage, said: "More therefore is involved than mere acceleration of the time of enjoyment." The only reasonable meaning this

could have is that the result would have been different if only acceleration, as contrasted with the *right* of enjoyment, had been involved. This Court seemed to leave no doubt about this by stressing, in the next sentence, that "the very right of enjoyment is affected. * * *"

The lower court's assimilation of the instant case with the *Holmes* case disregards the factual realities, as well as the different legal implications of the purpose and scope of Section 811(d). In the instant case, the decedent did not, as in the *Holmes* case, have the power to shift economic interests between beneficiaries with conditional interests, either by materializing the expectancy of one beneficiary by eliminating the defeating condition as to him, at the expense of the other beneficiary, or by preserving the expectancy of the latter, at the expense of the former. A failure to recognize this basic factual difference would render meaningless the reasoning of this Court in the *Holmes* case, as is readily seen in the following conclusion drawn therefrom by the court below:

> "* * * As the Supreme Court said, it was not a mere question of acceleration of payment, of whether he should enjoy the property sooner or later, but whether he should enjoy it at all, or not. * * *" (R. 47).

Under this conclusion, any grantor who had the power merely to accelerate payment would automatically have the power over "whether he should enjoy it at all, or not"—because any beneficiary of any trust will not enjoy it at all if he dies before distribution, regardless of whether he has an unconditionally vested or contingent interest. Thus, if "enjoyment" is used solely in the sense of possession by the beneficiary, as the court below has obviously used it, then, *in all cases*, the power merely to accelerate payment is necessarily the same as the power to confer the right of enjoyment.

The court below, in effect, says that any power to give any beneficiary possession before his possible death is subject to Section 811(d). As every beneficiary is subject to the possibility of death at any time, any power to accelerate the *time* of enjoyment would be taxable. But what this Court said in the *Holmes* case was that "More therefore is involved than mere acceleration of the time of enjoyment"—that "The very right of enjoyment is affected, * * *."

If Section 811(d) were applicable to every power to accelerate the time of enjoyment, then it would seem that the distinction drawn and stressed throughout the opinion of this Court in the *Holmes* case, between a power merely to accelerate the *time* of enjoyment and a power over the *right* of enjoyment, would be meaningless and unnecessary.

The Court of Appeals for the 5th Circuit did not regard this distinction as meaningless, in *Hays' Estate* v. *Commissioner, supra,* the only decided case, other than the instant one, involving unconditionally vested interests. In that case, in which the decedent reserved the power to accumulate income and to terminate the trust at any time, the trust instrument provided that in the event of the death of of any of the beneficiaries, his interest "shall pass to his or her heirs at law under the laws of descent and distribution of the State of Mississippi." In that case, with which the court below in the instant case does not agree, the Court of Appeals recognized that the decision in the *Holmes* case turned on this very point—to be taxable the power has to be over the right of enjoyment rather than the mere acceleration of the time of enjoyment. The Court there said:

> "The exercise of the power of the decedent to terminate the trust could not have created or terminated any right of enjoyment of trust property or changed the person or persons who were entitled to enjoy it."

The beneficiaries in the *Hays* case had exactly the same interests in the principal and income as the beneficiaries in

the instant case had under New York law. The Court of Appeals, in a footnote, pointed out that this also would have been the case under Mississippi law in the absence of words of inheritance in the trust instrument. The court below in the instant case assumed, but did not decide, that the beneficiaries had unconditionally vested interests (R. 31). It is established beyond any doubt under New York law, which is controlling as to the character of the beneficiaries' interests, *Helvering* v. *Stuart*, 317 U. S. 154; *Blair* v. *Commissioner*, 300 U. S. 5, that the beneficiaries had unconditionally vested interests in the principal, *Manufacturers Trust Company* v. *Chase National Bank*, 282 N. Y. 790; *Cammann* v. *Bailey*, 210 N. Y. 19; *Connelly* v. *O'Brien*, 166 N. Y. 406, and in any income accumulated during minority, *Smith* v. *Parsons*, 146 N. Y. 116; *Morris* v. *Morris*, 272 N. Y. 110.

In every decision by a Court of Appeals or by the Tax Court of the United States involving this question, since the decision of this Court in the *Holmes* case, said decision by this Court has been interpreted as meaning that Section 811(d) is applicable only to powers over conditional interests. *Hays' Estate* v. *Commissioner, supra. Loughridge's Estate* v. *Commissioner*, 183 F. 2d 294 (CCA 10) cert. den. 340 U. S. 830.

> "His power under the trust instrument *affected not only the time of possession and enjoyment but also the the person or persons who might come into ownership and enjoyment of the property. The reservation of power to shift or vary in that manner the interests of the beneficiaries was a substantial attribute of ownership and control.*" (Italics supplied.)
>
> *Hauptfuhrer's Estate* v. *Commissioner*, 195 F. 2d 548 (CCA 2).

> "Each son's enjoyment of the remainder was uncertain in that it depended on his surviving until the termination of the trust. The settlor's reserved power of

termination was thus a power whereby the settlor could at any time not only accelerate the time of enjoyment, but *could transform an otherwise uncertain possibility of enjoyment into a certainty.*" (Italics supplied.)

Industrial Trust Co. v. *Commissioner*, 165 F. 2d 142 (CCA 1).

"Under Sec. 811 (d) the fact that the decedent can only choose among a limited class is immaterial. Commissioner v. Estate of Holmes, 1946, 326 U. S. 480, 66 S. Ct. 257, 90 L. Ed. 228; * * *. *But under Sect. 811 (d) only the interest that may be shifted is included in the gross estate.*" (Italics supplied.)

Commissioner v. *Hofheimer's Estate*, 149 F. 2d 733 (CCA 2).

"The test is not whether the change has to be brought about by an acceleration of the falling in date of remainders or in some other particular way but *whether the power reserved may be exercised to shift comparatively substantial economic benefits.*" (Italics supplied.)

Zirjacks v. *Scofield*, 197 F. 2d 688 (CCA 5).

"The powers reserved to the trustees by this indenture are even broader than those in the *Holmes* case, *supra*, of which the Supreme Court said that one who has the power to terminate contingencies upon which the *right of enjoyment* is staked, so as to make certain that a beneficiary will have it who may never come into it if the power is not exercised, has a power which affects not only the time of enjoyment but one which is determinative of the persons who may enjoy the trust estate, *a power which affects the very right to enjoyment itself.*" (Italics supplied.)

Estate of Frank Clowe, 17 T.C. 1467.

No case has been found in which there is even any dictum to the effect that the decision in the *Holmes* case is applicable to a power to distribute an interest to one uncondi-

tionally vested therewith. The decision of the court below in the instant case stands alone against a uniformly contradictory judicial background.

Furthermore, the decision of the court below is in conflict with the basic principle established by this Court in the early cases involving Section 811(d), such as *Porter* v. *Commissioner*, 288 U. S. 436, and *Estate of Sanford* v. *Commissioner*, 308 U. S. 39. In the *Porter* case, this Court made it clear that only substantive powers are covered by Section 811(d); that is to say, powers whose termination by death constitutes a substitute for testamentary disposition.

> "His death terminated that control, ended the possibility of any change by him and was, *in respect of title to the property* in question, the source of valuable assurance passing from the dead to the living. *That is the event on which Congress based* the inclusion of property so transferred in the gross estate as a step in the calculation to ascertain the amount of what in section 301 (26 USCA Secs. 1092, 1093) is called the net estate. Thus was reached *what it reasonably might deem a substitute for testamentary disposition.*" (Italics supplied.)

The assimilation of the instant case with the *Holmes* case is in conflict with the purposes of Section 811(d) and the rationale for its application which consistently run through the cases from the beginning. The underlying purpose of the estate tax provisions which impose estate tax upon the subject matter of lifetime transfers, is to prevent avoidance of estate tax by transfers which are essentially substitutes for testamentary disposition. *Porter* v. *Commissioner, supra; Helvering* v. *City Bank Farmers Trust Company*, 296 U. S. 85; *Estate of Sanford* v. *Commissioner, supra; Helvering* v. *Hallock*, 309 U. S. 106.

The decision in the *Holmes* case may be said to be merely an application of the basic principle, established in the foregoing cases, to a power of disposition between different conditional beneficiaries of the decedent's own designation. In the instant case, neither the creation of the trusts nor the expiration of the power upon the decedent's death can in any sense be viewed as "substitutes for testamentary disposition." The persons who would take from the beneficiary, if he died before distribution, would be persons beyond the designation or control of the decedent, namely, the beneficiary's heirs or legatees, or his living donees or assignees. That is far different from the power of the decedent in the *Holmes* case, by exercise thereof, to consummate otherwise conditional rights in the primary beneficiaries of his own selection and thereby to cut off completely the interests of alternative remaindermen also of his own selection or, by non-exercise thereof, maintain the interests of said alternative beneficiaries.

The "right of enjoyment" which the decedent had the power to confer in the *Holmes* case was more than immediate possession. It was the right to economic ownership.

The decision in the instant case is a variance from all of the other cases, which is neither required nor supported in principle, nor by any practical considerations. It is an unprecedented and extended application of Section 811(d), with serious and unjustified potential tax consequences. The decedent-grantor of such a trust would be subject to estate tax because of his supposed power over the property, and the beneficiary of the trust, in the event of his death before distribution, would himself be subject to estate tax with respect to the same property, because of his ownership of the principal and income interests therein. *Kinney's Estate* v. *Commissioner, supra.* It is readily apparent that the taxation of the beneficiary because he owns

the interest in the trust is completely inconsistent with any power of the decedent to create or effect said ownership. If the beneficiary's interests were dependent upon the exercise or non-exercise of a power by the decedent, he would not have the ownership requisite for estate taxation. *Commissioner* v. *Rosser*, *supra*. But he clearly does have such ownership.

However, in the instant case, we would have a tax upon the grantor-decedent on the theory that because of his retained powers his death effected a disposition in the nature of a substitute for a testamentary disposition, and another tax on the beneficiary because he had a vested interest which he received when the trust was created. This would be a perversion of the tax avoidance purpose of Section 811(d) into a special levy upon those unwary persons who created such trusts in bygone years without the slightest semblance of any tax avoidance motives, and, also, we might add, without the slightest reason to suspect that the fund they were so providently providing for the future of their children might suffer the improvidence of such tax invasion.

Furthermore, no matter where or how one tries to articulate the decision of the Court below in the instant case with the body of developed tax law, it is a square peg in a round hole. The gift tax regulations (Section 86.3(a)) provide that "a gift in trust is incomplete if the donor reserves the power to name new beneficiaries or to change the interests of the beneficiaries as between themselves," but provides, contrariwise, that "a gift shall not be considered incomplete, however, merely because the donor reserves the power to change the manner or time of enjoyment thereof." It is submitted that, if the reserved powers are not sufficient to render the gift incomplete, they are likewise insufficient for estate taxation under Section 811(d).

While this Court, in *Smith* v. *Shaughnessy*, 318 U. S. 176, and *Robinette* v. *Helvering*, 318 U. S. 184, pointed out that it was not intended in *Estate of Sanford* v. *Commissioner*, 308 U. S. 39, to establish a general principle that gift and estate taxes are "always" mutually exclusive, it did not question the mutual exclusiveness of such taxes in the *Sanford* case, which involved Section 811(d) powers. This Court merely refused to extend such exclusiveness to cases involving interests reserved to the grantor, such as reverter interests and reserved life estates, as contrasted with the reserved powers in the *Sanford* case. That it did not intend to alter the applicability and rationale of the *Sanford* decision in cases involving reserved powers, seems evident from the following statement in the opinion in the *Shaughnessy* case, at p. 181:

> "The separable interests transferred are not gifts to the extent that power remains to revoke the trust or recapture the property represented by any of them, Burnet v. Guggenheim, supra, or to modify the terms of the arrangement *so as to make other disposition of the property*, Sanford v. Commissioner of Internal Revenue, supra. In the Sanford case the grantor could, by modification of the trust, extinguish the donee's interest at any instant he chose. In cases such as this, where the grantor has neither the form nor substance of control and never will have unless he outlives his wife, we must conclude that he has lost all 'economic control' and that the gift is complete except for the value of his reversionary interest." (Italics supplied.)

It also alluded as follows, at page 179 of the same case, to the fact that Congress intended some gifts to be subject to estate tax and "some not."

> "It is sufficient to note here that Congress plainly pointed out that 'some' of the 'total gifts' subject to gift taxes . . . may be included for estate tax pur-

poses *and some not.*' House Report No. 708, 72d Cong. 1st Sess., p. 45." (Italics supplied.)

It seems clear that trusts involving the question of Section 811(d) powers are an exception to the general principle that gift and estate taxes are not always mutually exclusive. No other type of transfer would seem to have any better reason to stand in that position. Accordingly, in view of the fact that the reserved powers in the instant case would not render the gift incomplete, they should not serve as the basis for estate tax.

Imposition of the estate tax in those cases where the beneficiaries have unconditionally vested interests, merely because of a power to accelerate their possession, would require the blanketing under Section 811(d) of gifts by a grantor to an infant child, with himself as guardian for the child. Section 811(d) covers any interest of which the decedent "has at any time made a transfer, by trust *or otherwise*, * * *." Such an infant, for whom the grantor acts as guardian, has vested ownership rights subject to deferment of possession of the principal, and the guardian has discretionary power with respect to distributions of income and principal. And such a guardian is subject to the same supervision as a trustee. If the line cannot be drawn short of the trusts in the instant case, then it is submitted that a grantor-guardian would likewise be subject to Section 811(d). Certainly, such a result could not have been within the presumed legislative intent.

In short, the decedent did not have a power to "alter, amend or revoke" under Section 811(d). To say that his power to make early distribution was such a power is as unrealistic as to say that a mortgagor who has a right to anticipate payments has reserved the power to alter, amend or revoke the debt created by him and owned by the mortgagee.

This case does not contain any of the aspects sought to be reached by the estate tax provisions as substitutes for testamentary disposition. The transfers were not to take effect at death. The decedent did not reserve any enjoyment to himself, nor did he reserve any power of disposition among others.

It is respectfully submitted that the unprecedented application of Section 811(d) in the instant case is neither required by, nor finds support in, the *Holmes* case or other cases dealing with that section, and is contrary to the purpose of said section. Furthermore, in view of the penalising tax aspects, such a departure from or extension of the scope of Section 811(d), as heretofore applied, should not be adopted, in the absence of the mandate of a clearly expressed legislative intent or impelling practical considerations of the revenue, neither of which factors is present in this case.

Conclusion

It is respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that there may be a final determination of whether a power such as the decedent had is within the scope of the estate tax statute in question.

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Appendix

Section 811(d)(2) of the Internal Revenue Code:

"(2) *Transfers on or prior to June 22, 1936*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Except in the case of transfers made after June 22, 1936, no interest of the decedent of which he has made a transfer shall be included in the gross estate under paragraph (1) unless it is includible under this paragraph."

Section 86.3(a) of Regulations 108:

"As to any property, or part thereof or interest therein, of which the donor so parted with dominion and control as to leave in him no power to change the disposition thereof, whether for his own benefit or for the benefit of another, the gift is complete. But if upon a transfer of property (whether in trust or otherwise) the donor reserves any power over the disposition thereof, the gift may be wholly incomplete, or may be partially complete and partially incomplete, depending upon all the facts in the particular case. Accordingly, in every case of a transfer of property subject to a reserved power the terms of the power must be examined and its scope determined.

"A gift is incomplete in every instance where a donor reserves the power to revest the beneficial title to the property in himself. A gift is also incomplete where and to the extent that a reserved power gives the donor the right to name new beneficiaries or to change the interests of the beneficiaries as between themselves. Thus, the transfer of an estate for life,

where, by an exercise of the power, the estate may be terminated or cut down to one of less value, and without restriction upon the extent to which the estate may be so cut down constitutes an incomplete gift. If in this example the power was confined to the right to cut down the estate for life to one for a term of five years, the certainty of an estate for not less than that term results in a gift to that extent complete."